PELANGI AIRWAYS SDN BHD

v.

MAYBAN TRUSTEES BHD

HIGH COURT MALAYA, KUALA TERENGGANU
ABDUL HAMID EMBONG J
[ORIGINATING SUMMONS NO: 24-59-2000]
30 JANUARY 2001

CIVIL PROCEDURE: *Parties - Intervention - Application for leave to intervene and be named a party in proceedings - Whether application defective since intitulement included proposed intervener as party without prior leave of court - Whether proposed intervener affected by restraining order obtained by party in proceedings*

COMPANY LAW: *Arrangements & reconstructions - Restraining order - Companies Act 1965, s. 176(10) - Failure to lodge statement of affairs of company as required by sub-para. (c) of s. 176(10A) - No nomination of director by creditors with court's approval as required by sub-para (d) of s. 176(10A) - Whether requirements mandatory requirements - Whether restraining order rendered irregular - Whether application to set aside restraining order should be allowed*

This was an application by Mayban Trustees Bhd ('Mayban Trustees') for leave to intervene in this proceedings and consequently be named a party and to amend the intitulement of the summons herein. Mayban also sought for the restraining order of this court obtained by the applicant, Pelangi Airways Sdn Bhd ('Pelangi') to be set aside. Pelangi had obtained the restraining order under s. 176(10) of the Companies Act 1965 ('CA') wherein it was granted a year's immunity from further proceedings in any action.

The issues were: (i) whether the application was defective since its intitulement had included Mayban Trustees as a party without prior leave of the court being granted based on *Arab Malaysian Merchant Bank Bhd v. Jamaluddin bin Dato' Mohd Jarjis*; (ii) whether Mayban was affected by the restraining order and should be given an opportunity to be heard; and (iii) whether the restraining order was valid.

Held:

[1] The case of *Arab Malaysian Merchant Bank Bhd v. Jamaluddin bin Dato' Mohd Jarjis* was no authority for the proposition put forward by Pelangi that an intervener needed first to obtain the court's leave before

the intitulement of the summons could be changed to include the intervener as a party. Firstly, Mayban Trustees was not yet a party but as the description suggested only a proposed party at this stage. Secondly, the joinder of a necessary party is governed by O. 15 r. 6 of the Rules of the High Court 1980 ('RHC') which does not mandatorily require leave of the court to be first obtained as a pre-condition to amending the intitulement of the summons. Furthermore, the adding in of Mayban Trustee's name to this summons did not in any way prejudice Pelangi.

[1a] To hold that such a defect was fatal would be most unjust to Mayban Trustees because as was held in *Pegang Mining Co Ltd v. Choong Sam & Ors*, one of the principle objects of the former O. 16 r. 11 of the Rules of the Supreme Court (now O. 15 r. 6 RHC) is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without being given an opportunity of being heard.

[2] By virtue of O. 15 r. 6 RHC, the court has the discretion to allow for a party to be joined in proceedings. Further, the court was satisfied on the facts that Mayban Trustees represented a portion of Pelangi's creditors and thus had fully satisfied the test laid down by the Privy Council in *Pegang Mining Co Ltd*. Therefore, its prayer to be enjoined as an intervener should be allowed.

[3] One of the mandatory requirements before a restraining order may be granted is for an applicant company to lodge a statement in the prescribed form as to the affairs of the company as required by sub-para. (c) of s. 176(10A) CA. In the instant case, there was no dispute that the statement of Pelangi's affairs in the prescribed form was not lodged together with its application for the restraining order.

[3a] Apart from the above, Pelangi also failed to comply with sub-para. (d) of s. 176(10A) for the appointment of a director by the majority of the creditors. In *Re Sanda Industries Bhd & 2 Ors* it was held that even where a person is nominated pursuant to sub-para. (d) of s. 176(10A) CA, no restraining order may be granted if the court does not approve or appoint him to act as a director. Therefore, if, for whatever reason, no person is nominated by the creditors, there can be no approval or

appointment by the court and thus no restraining order may be granted. As Pelangi failed to furnish to the court the required information under both the sub-paras. above, Pelangi's initial application and restraining order were irregular.

[Application allowed; restraining order set aside.]

Case(s) referred to:
Alloy Automative Sdn Bhd v. Perusahaan Ironfield Sdn Bhd [1986] 1 MLJ 382 ***(refd)***
Arab Malaysian Merchant Bank Bhd v. Jamaluddin Dato' Mohd Jarjis [1991] 1 MLJ 27 ***(refd)***
Pegang Mining Co Ltd v. Choong Sam & Ors [1969] 2 MLJ 52 ***(refd)***
Ng Hee Thoong v. Public Bank [1995] 1 CLJ 609 ***(refd)***
Re Sanda Industries Bhd & Ors [1999] 1 CLJ 459 ***(foll)***

Legislation referred to:
Companies Act 1965, ss. 176(10A), (10C)
Rules of the High Court 1980, O. 15 r. 6

For the applicant - Ahmad Zolkifli Ahmad Tabrani (Zulkiflee Zainuddin with him); M/s Amir Yusoff & Zol
For the intervenor - SM Yoong (Jeremy Tan with him); M/s Shook Lin & Bok

Reported by Usha Thiagarajah

JUDGMENT

Abdul Hamid Embong J:

Encl. 9 is an application by Mayban Trustees Bhd (Mayban Trustees) seeking leave to intervene in this proceeding and consequently be named a party and to amend the intitulement of this summons. The intended intervenor also sought for the order of this court dated 3 July 2000 be set aside. The relevant original prayers are worded such:

(a) bahawa kebenaran hendaklah diberikan kepada pencelah yang dicadangkan untuk mencelah dalam prosiding ini;

(b) bahawa pencelah yang dicadangkan tersebut hendaklah dijadikan satu pihak kepada prosiding-prosiding ini dan tajuk tindakan ini dipinda bagi memasukkan pencelah yang dicadangkan sebagai responden;

(c) (i) bahawa perintah yang dibuat oleh mahkamah ini pada 3 July 2000 hendaklah diketepikan;

On 3 July 2000 the applicant, Pelangi Airways Sdn Bhd (Pelangi) by way of an *ex parte* chambers application obtained a restraining order under s. 176(10)

Companies Act 1965 wherein Pelangi was granted a one year period of immunity from further proceedings in any action.

At the outset, counsel for Pelangi raised a preliminary objection on the issue that this application (encl. 9) was defective since its intitulement had included Mayban Trustees as a party without prior leave of the court being granted. Learned counsel cited *Arab Malaysian Merchant Bank Bhd v. Jamaluddin Dato' Mohd Jarjis* [1991] 1 MLJ 27 where the respondent, in attempting to set aside a judgment in default entered against the judgment debtors had gone through the motion of seeking leave from the court to be made a party and such leave was accordingly granted by the SAR and confirmed, on appeal, by the judge in chambers. That case however, is no authority for the proposition put forward by Pelangi's counsel that an intervenor needed first to obtain the court's leave before the intitulement of this summons can be changed to include the intervenor as a party. Firstly, the intended intervenor here is not yet a party, but as the description (pencelah yang dicadangkan) suggests, only described as a proposed party at this stage. Secondly, the joinder of a necessary party as Mayban Trustees are here, is governed by O. 15 r. 6 Rules of the High Court 1980 which does not mandatorily require leave of the court to be first obtained as a pre-condition to amending the intitulement of the summons. Furthermore, the adding in of Mayban Trustees' name to this summons did not in any way prejudice Pelangi. On the other hand to hold that such a defect is fatal would, in my view, be most unjust to the applicant here because as was held in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52, one of the principal objects of the former O. 16 r. 11 of the Rules of Supreme Court (now O. 15 r. 6 RHC) is to enable the court to prevent injustice being done to a person whose rights will be affected by its judgment by proceeding to adjudicate upon the matter in dispute in the action without his being given an opportunity of being heard. As such, the preliminary objection was dismissed.

Having disposed of the preliminary objection, the court went on to consider the merit of the intended intervenor's application to be added as a party. The only objection raised by learned counsel for Pelangi was that Mayban Trustees acted as a trustee and that it was not a creditor or had received any instruction or obtained any mandate from any of Pelangi's creditors to apply to be a party in this proceeding. In my view this argument does not hold water. As trustee for the bondholders, Mayban Trustees is clearly a person affected by the earlier restraining order and should be given an opportunity to be heard. Order 15 r. 6 of the RHC 1980 provides for the scope in which this court may exercise its discretion to allow for a party to be joined in. It states:

(2) At any stage of the proceedings in any cause or matter the Court may on such terms as it thinks just and either of its own motion or on application:

(a) ...

(b) order any of the following persons to be added as party namely ...

(ii) any person between whom and any part to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief of remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter;

Applying the test laid down by the Privy Council in *Pegang Mining Co Ltd v. Choong Sam & Ors* [1969] 2 MLJ 52, as accepted over here [see e.g. the Supreme Court decision in *Jamaluddin*'s case [1991] 1 MLJ 27] which is that will the intervenor's right against or liabilities to any party to an action be directly affected by any order made in the action, I am satisfied that Mayban Trustees, as trustee to the bondholders and thus representing a portion of Pelangi's creditors, had fully satisfied that test. In that event its prayer to be enjoined as an intervenor was allowed.

Now, to the brief background facts. On 11 October 1991 a trust deed was executed between Pelangi appointing Mayban Trustees pursuant to a decision by Pelangi to issue RM40 million secured bearer bonds which were subscribed to by five participating banks (bondholders). The said bonds were secured by two deeds of mortgage executed by Pelangi in favour of Mayban Trustees over two Fokker 50 aircrafts. Pelangi defaulted in its payment of interest to the bondholders and Mayban Trustees, pursuant to its obligation as trustee to the bondholders under the trust deed, commenced legal proceedings against Pelangi in Kuala Lumpur *vide* suit No. D4-22-165-199 and on 5 August 1999 obtained summary judgment against Pelangi in the sum of RM48,822,424.82 on the principal debt and accrued interest. On 17 June 1998 Mayban Trustees appointed a receiver over the aircrafts. On 22 August 2000 the receiver received a notice of the *ex parte* restraining order dated 3 July 2000 obtained by Pelangi.

Before me, the restraining order obtained on 3 July 2000 was challenged as to its validity based on two main grounds *viz*:

(i) that certain provisions of s. 176(10A) and s. 176(10C) of the Companies Act 1965 had not been complied with when the application for the restraining order was made; and

(ii) that although the restraining order was obtained on 3 July 2000 Pelangi made no attempt to notify the receiver of it until 22 August 2000 and was reluctant to notify Mayban Trustees who represented a large portion of Pelangi's creditors. Mayban Trustees also complained that Pelangi had, to date, made no attempt to meet with it and the other bondholders to present its alleged proposed restructuring scheme and questioned the *bona fide* of the restraining order. Also, in the meantime, the receiver had advised Mayban Trustees that the aircrafts continue to deteriorate and depreciate in value. There is also an offer to purchase the aircrafts for US$5.5 million by one Kaufman Shayes Sdn. Bhd. which cannot materialise due to the restraining order. Meanwhile, Pelangi admitted to making RM2 to RM3 million per month for the use of the aircrafts but had not, save for a one off US$200,000 payment, paid anything to Mayban Trustees.

The Statutory Requirements Under Section 176(10A)

One of the mandatory requirements before a restraining order may be granted is for an applicant company a statement in the prescribed form as to its affairs. This is provided for under s. (10A)(c) which states:

> (10A) The Court may grant a restraining order under sub-section (10) to a company for a period of not more than ninety days or such longer period as the Court may **for good reason allow if and only if**:
>
> (c) a statement in the prescribed form as to the affairs of the company made up to a date not more than three days before the application is lodged together with the application. (Emphasis added).

Firstly it can be immediately noticed from the phrase underscored above that the court will only allow a restraining order for a period beyond the principal 90 days only for a "good reason". The qualifying words "if and only if" means that the applicant must, without fail, comply with the conditions set out in the sub-paragraphs to (10A), one of which is for the furnishing of its statement of affairs under sub-para. (c). This, in my view, is an absolute neccessity in order that the court may discern a "good reason" for extending the 90-day restraining period to say, as in this case, one year. In the instant case, there was no dispute that the statement of Pelangi's affairs in the prescribed form was not lodged together with its application. In considering this objection by Mayban Trustees I had perused Pelangi's application at encl. 1 (the *ex parte*

originating summons) and its affidavit in support and could not find the required statement of affairs accompanying the application. Learned counsel for Pelangi also could not show to the court, when asked, what is the "prescribed form" in which the statement is to be furnished. As such, this court is in full agreement with learned counsel for Mayban Trustees, that Pelangi had failed to comply with one of the mandatory requirements under s. 176 (10A).

The second objection taken up by Mayban Trustees is the failure to comply with the requirement provided under sub-para. (d) which states:

> (d) it approved the person nominated by a majority of the creditor in the application by the company under sub-section (10) to act as a director or if that person is not already a director, notwithstanding the provisions of this Act or the memorandum or articles of the company, appoints the person to act as a director.

The faint reply from learned counsel for Pelangi on this issue was that he had submitted to the learned judge on presenting the application that the creditors may not have a common consensus in appointing a director. The law is trite on the need to specifically reply to an allegation otherwise that allegation not replied must be taken to have been accepted. [See *Alloy Automative Sdn Bhd v. Perusahaan Ironfield Sdn Bhd* [1986] 1 MLJ 382]. It is also settled law that any matter that is raised by appearing counsel from the bar table may be ignored by the court. [See e.g. *Ng Hee Thoong v. Public Bank* [1995] 1 CLJ 609]. But, more importantly, the explanation by learned counsel is in my view inplausible. Under sub-para. (d) it is for the court to approve the person nominated by the majority of the creditors to act as a director.

On this issue, the court also found favour with the stand taken by Mayban Trustees' counsel. In *Re Sanda Industries Bhd & Ors* [1999] 1 CLJ 459, where no person had been nominated pursuant to sub-para. (d), it was held by Abdul Aziz Mohamad J that "even where a person is nominated no restraining order may be granted if the court does not approve or appoint him to act as a director ... So if, for whatever reason, no person is nominated by the creditors, there can be no one to approve or appoint, no one then is approved or appointed, and no restraining order may be granted." I fully subscribe to the learned judge's construction of sub-para (d).

Having heard the respective submissions on both the statutory grounds of

non-compliance by Pelangi in its application to obtain the restraining order, I had asked learned counsel for Mayban Trustees to go no further. I was satisfied that Pelangi had failed to furnish to the court the required information under both the sub-paragraphs and had to conclude that Pelangi's initial application and thus the restraining order, had been irregular. The restraining order is thus set aside with costs of this application given to Mayban Trustees.